Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

LABOUR STANDARDS IN A GLOBALISED ECONOMY SYMPOSIUM

What's in a name? Labour Rights between Human Rights and Sustainable Development

TONIA NOVITZ — 6 November, 2015

Print 0

'Tis but thy name that is my enemy; ...
What's in a name? that which we call a rose
By any other name would smell as sweet;'

William Shakespeare, *Romeo and Juliet*, Act I, Scene 2

Labour standards have long been recognised as relevant to the terms of trade, given fears of unfair competition and even 'social dumping'. However, labour standards rarely receive protection in trade instruments *per se*. They have

been treated historically as a species of 'human rights' and, more recently, as worthy of inclusion in 'sustainable development' (SD) chapters. Some commentators (such as Bartels, Van Den Putte and Orbie) have raised concerns regarding this change of perspective. It is argued here that there is no conceptual barrier to the broader-based protection of labour standards in SD terms, which can encompass protection of those labour standards also commonly termed human rights. Rather, it is the ways in which SD chapters can be marginalised within trade agreements which could pose problems, as illustrated by the EU- Canada Comprehensive Economic Trade Agreement (CETA), which in turn gives us some indication of what we may expect from the Transatlantic Trade and Investment Partnership (TTIP).

The problem with human rights clauses

In international trade conditionality, (some) labour rights used to be treated as human rights and were seemingly enforceable as such. This approach was arguably consolidated after the adoption by the International Labour Organisation (ILO) of a Declaration on Fundamental Principles and Rights at Work 1998. The 'core' labour standards (CLS) identified in Article 2 of that instrument then became the key sources of reference in trade instruments. They consisted of:

1. freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of all forms of forced or compulsory labour;
3. the effective abolition of child labour; and
4. the elimination of discrimination in respect of employment and occupation.

ILO Conventions relating to these topics became the eight 'fundamental' Conventions to which States would have referenced for trade purposes. The EU, in particular, took this approach in key free trade agreements (FTAs) and the Generalized System of Preferences (GSP), offering trade incentives for ratification and compliance under what came to be known as GSP+ and providing for withdrawal of preferences in cases of serious breach.

There were a number of difficulties with this approach:

1. EU resistance to the implementation of 'essential elements' human rights clauses, which would entail suspension of trade preferences, except in the most egregious of circumstances. This is a bare minimum approach.
2. The exclusion of other labour standards, such as health and safety or wage determination, which, while not qualifying as civil and political rights, are of vital importance to workers.
3. Leading on from 2., a fear was generated by developing countries that the application of labour standards in human rights clauses was not determined by human rights violations, but by security concerns or economically motivated protectionism.

The potential benefits and disadvantages of the SD approach

A shift to the inclusion of labour standards in SD chapters in GSP+ (from 2008) and FTAs (from 2010) allowed for recognition of socio-economic rights and a broader base of issues associated with the ILO's Decent Work Agenda (as recognised in the ILO Declaration on Social Justice for a Fair Globalisation 2008), notably employment promotion, social security and social dialogue. Arguably, at least in theory, a SD approach can still recognise the human rights dimensions of labour standards. In this sense, a capabilities

discourse (see Sen and Nussbaum) may be helpful. Viewing development as freedom can enable recognition of the significance of affiliative action, which in the context of labour standards can translate into freedom of association and collective voice. Further, a broader agenda can be pursued in the trade arena through civil society dialogue (see the Domestic Advisory Groups created under the EU-Korea FTA and the scope for capacity building this may entail). In this way, freedom of speech and association can be protected and these freedoms utilised in a proactive way to enhance working conditions.

The dangers might seem to lie in:

1. The 'rebalancing of labour standards' so that they are no longer imperative human rights but rather only one of four pillars of sustainable development – the others being environmental, economic and cultural protections. This may, however, not be insurmountable, given that some labour standards as human rights may still be given priority. Also, some very basic entitlements, such as freedom of association, have long been subject to compromise in response to other rights and public policy.
2. A shift towards 'soft law'. Nevertheless, the complementary provision of hard law for human rights and softer policy-oriented interventions for promotions of other labour standards may be beneficial, allowing an orientation towards aid assistance rather than a bare 'stick'.

The problem in practice: the case for mainstreaming

It remains arguable that the problem lies not so much with the theoretical acceptance of labour standards as a facet of SD, but rather the practical application of such an approach. With the inclusion of SD chapters in the CETA and

potentially TTIP (as is being suggested in European Commission documents so far released), this is a live issue.

CETA indicates that SD chapters are not only appropriate for North-South agreements, but also for North-North agreements. In this instrument the labour standards chapter follows and is linked to that on SD, leading on to another on trade and labour standards (see Chapter XX, especially Part 24). Article 1 sets out the case for protection of 'decent work' covering 'core labour standards, and high levels of labour protection, coupled with effective enforcement'. There is recognition here in Article 3 of workers' rights as human rights, but also of health and safety and establishment of other minimum employment standards. There is likewise stress placed in Article 2 on the right to regulate, including the ability of both parties to 'continue to improve those laws and policies', such that there will not be static minimal levels of protection but dynamic enhancement of work-related protections. A dispute settlement procedure and provision for civil society engagement accompanies the chapter. All, so far, so good.

However, the question is whether either side would actually make use of dispute settlement procedure provided with reference to ILO standards, or whether the parties are more likely to reach the political settlement that is permitted, leaving civil society a role in making recommendations but possibly achieving little else. Further, past experience in the EU in cases such as *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (freedom of services, treatment of posted workers), *ITF and FSU v Viking Line* (freedom of establishment/access to investment), *Rüffert v Land Niedersachsen* (public procurement terms and status of collective bargaining); and *FNV Kunsten Informatie en Media*

v Staat der Nederlanden, (collective bargaining and competition law) indicate that CETA provisions regarding services, posted work, investment, public procurement and competition law could lead to an erosion of labour standards.

Ultimately, labour standards need to be mainstreamed into the terms of trade. They need to be understood as an ongoing limit on trade freedoms claimed by States and private actors. As such, they should not be dealt with separately in a discrete chapter at the end of a FTA in an apparently marginalised manner but be foregrounded in a preliminary section and understood to inform all aspects of the agreement. Claims need to be able to be brought by workers and their organisations akin to the voice given to investors; and there needs to be capacity for trade unions to respond to State and investor claims regarding breaches of trade provisions which would have implications for labour standards. Freedom of speech, freedom of association and access to justice demands as much. In this respect, Goal 8 and Goal 16 of the new Sustainable Development Goals adopted by the UN General Assembly on 25 September 2015 have particular significance. Otherwise, it is arguable that, whether formally referred to in terms of human rights or SD, labour standards will be meaningless.

Tonia Novitz is Professor of Labour Law at the University of Bristol.

ISSN 2510-2567

Tags: *CETA*, *Sustainable Development*, *TTIP*

Print Facebook Twitter Email

Related

Symposium: Labour Standards in a Globalised Economy
2 November, 2015
In "Labour Standards in a Globalised Economy"

Transcending the 'buddy vs bully' debate in light of the TTIP negotiations
9 November, 2015
In "Labour Standards in a Globalised Economy"

Systemic deficiencies of US FTAs' arbitral labour dispute settlement procedures
11 November, 2015
In "Labour Standards in a Globalised Economy"

PREVIOUS POST
The ILO, its standards and their supervision: difficult times?

NEXT POST
Transcending the 'buddy vs bully' debate in light of the TTIP negotiations

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.

Copyright © 2016 · | ISSN 2510-2567 | Impressum & Legal